No. 11-1059

IN THE

Supreme Court of the United States

GENESIS HEALTHCARE CORPORATION, ET AL.,
Petitioners,

v.

LAURA SYMCZYK,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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The Equal Employment Advisory Council (EEAC) respectfully submits this brief as *amicus curiae*. The brief supports the Petitioner and urges reversal of the decision below.[1]

[1] The parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

INTEREST OF THE *AMICUS CURIAE*

The Equal Employment Advisory Council (EEAC) is a nationwide association of employers organized in 1976 to promote sound approaches to the elimination of employment discrimination. Its membership includes approximately 300 major U.S. corporations that collectively employ roughly 20 million workers. EEAC's directors and officers include many of industry's leading experts in the field of equal employment opportunity. Their combined experience gives EEAC a unique depth of understanding of the practical, as well as legal, considerations relevant to the proper interpretation and application of fair employment practices and equal employment opportunity policies.

All of EEAC's members are employers subject to the Fair Labor Standards Act of 1938 (FLSA), 29 U.S.C. §§ 201 *et seq.*, as amended, the Equal Pay Act of 1963 (EPA), 29 U.S.C. § 206(d), as amended, and the Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. §§ 621 *et seq.*, as amended, as well as other federal workplace protection and nondiscrimination laws. The fair and consistent implementation of these laws and regulations is of paramount concern to all employers, including EEAC's members. Equally important to its membership, however, is that it not be forced by the courts to endure the exorbitant costs of continued litigation even after extending to the plaintiff an offer of full relief. The question presented regarding whether an FLSA collective action may be maintained even after the named plaintiff no longer has a legally cognizable interest in the outcome of the case therefore is of great importance to EEAC.

EEAC seeks to assist the Court by highlighting the impact its decision will have beyond the immediate

concerns of the parties. Because of its experience in these matters, EEAC is well-situated to brief the Court on the relevant concerns of the business community and the significance of the case to employers.

STATEMENT OF THE CASE

Respondent Laura Symczyk was employed as a registered nurse by a subsidiary of Petitioner Genesis HealthCare Corporation. On December 4, 2009, approximately two years after her employment ended, Symczyk filed an action in the U.S. District Court for the Eastern District of Pennsylvania on behalf of herself and others similarly situated alleging that Genesis had automatically deducted meal periods from her pay, regardless of whether she actually took a meal break, in violation of Sections 7 and 16(b) of the Fair Labor Standards Act, 29 U.S.C. §§ 207 & 216(b). Pet. App. 3.

On February 18, 2010, Genesis answered Symczyk's complaint and simultaneously presented her with an offer of judgment pursuant to Rule 68 of the Federal Rules of Civil Procedure in the amount of $7,500.00, representing compensation for alleged unpaid wages, attorney's fees, costs and expenses. Pet. App. 4 (footnote omitted). Although the offer of judgment fully satisfied her claims, Symczyk neither accepted nor rejected it. Pet. App. 42-43.

Genesis subsequently filed a motion to dismiss for lack of subject matter jurisdiction, on the ground that Symczyk's failure to respond to the offer of judgment deprived her of any personal stake or legally cognizable interest in the litigation. Pet. App. 5. The district court ultimately agreed, concluding that: (1) Symczyk was presented with an offer of judgment that fully satisfied her claims; (2) no other individu-

als opted into the collective action; and (3) no motion for conditional certification had been filed. Pet. App. 42-43. The district court noted that while other courts have allowed FLSA collective actions to proceed after the named plaintiff had been deprived of any ongoing stake in the litigation due to an offer of judgment, all of those cases involved situations where other individuals had already opted-in to join the collective action, or the plaintiff had already filed a motion for conditional certification under 29 U.S.C. § 216(b). Pet. App. 41-42.

The district court also acknowledged the distinction between class actions under Rule 23 of the Federal Rules of Civil Procedure, in which class members are presumptively covered by the lawsuit unless they opt out, and collective actions under FLSA Section 16(b), in which members "must take the affirmative step of opting in to the action to be a part of the action and bound by its terms." Pet. App. 39 (quoting *Darboe v. Goodwill Industries of Greater New York & Northern New Jersey, Inc.*, 485 F. Supp. 2d 221, 223-24 (E.D.N.Y. 2007)) (internal quotation marks omitted). In recognizing this critical difference between the Rule 23 class action device and FLSA collective actions, the district court affirmed the basic principle that in the latter, "'the named plaintiff is deemed to represent himself only.'" Pet. App. 39 (quoting *Darboe*, 485 F. Supp. at 224).

The Third Circuit reversed, relying heavily on this Court's decisions in *United States Parole Comm'n v. Geraghty*, 445 U.S. 388 (1980) and *Deposit Guaranty National Bank v. Roper*, 445 U.S. 326 (1980). Pet. App. 1-29. Despite acknowledging that an offer of full relief generally will moot a plaintiff's claims, it nonetheless reasoned that the issue of class certifica-

tion relates back to the filing of the complaint, such that even after the named plaintiff's claims have been exhausted, the case may proceed. Pet. App. 14-26 (citing *Weiss v. Regal Collections*, 385 F.3d 337 (3d Cir. 2004)).

The Third Circuit dismissed the differences between Rule 23 class actions and FLSA collective actions as largely "conceptual," concluding that the mootness inquiry cannot be "predicated inflexibly on whether any employee has opted in to an action at the moment a named plaintiff receives a Rule 68 offer," as "employers would have little difficulty preventing FLSA plaintiffs from attaining the 'representative' status necessary to render an action justiciable notwithstanding the mooting of their individual claims." Pet. App. 23-25 (quoting *Sandoz*, 553 F.3d at 920). It found that the collective action's opt-in mechanism changed only the manner in which a named plaintiff obtains a representational interest in others and did not act as a bar to representation in the first place. Pet. App. 25. Genesis then petitioned for a writ of certiorari, which this Court granted on June 25, 2012.

SUMMARY OF ARGUMENT

Article III of the United States Constitution limits the subject matter jurisdiction of federal courts to actual cases and controversies "capable of resolution through the judicial process." U.S. Const. art. III, § 2; *Flast v. Cohen*, 392 U.S. 83, 95 (1968). This doctrine "functions to ensure, among other things, that the scarce resources of the federal courts are devoted to those disputes in which the parties have a concrete stake." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 191 (2000).

The plain language of the FLSA provides that collective action plaintiffs represent themselves—and only themselves—until such time as other individuals give their written consent to participate in the litigation. In the absence of that consent, and in particular in the absence of even an *attempt* to obtain their consent, the only legally sound and fair application of Article III is that a collective action be inextricably tied to the named plaintiff's personal right to obtain any relief from the litigation.

While this Court's decisions in *Roper* and *Geraghty* contemplate the continuation of a class action even where the named plaintiff no longer has any personal stake in the litigation, neither addresses the issue in the context of a FLSA collective action where, as here, no motion for conditional certification has ever been filed and no other known plaintiffs exist.

Once a named plaintiff's claims have been rendered moot, and where no other plaintiffs have been identified, the only individual with any conceivable interest in pressing forward is the plaintiff's attorney, for purely financial reasons. Permitting the use of judicial resources in this manner would discourage settlement and facilitate protracted litigation, an outcome that is at odds with the well-established public policy, reaffirmed repeatedly by this Court, favoring voluntary resolution of disputes. To the contrary, such a rule would provide ample incentive for plaintiff's attorneys to file every single-plaintiff FLSA suit as a collective action, knowing that regardless of the outcome of their own client's claims, they still will have an opportunity to pursue additional plaintiffs with the court's assistance. The far more reasonable course of action is to reverse the Third Circuit's decision so as to ensure that employ-

ers can offer a settlement aimed at fully compensating employees with legitimate claims, while at the same time preserving the rights of those hypothetical plaintiffs, who may still file suit either on their own or collectively after the named plaintiff's claims have been resolved.

ARGUMENT

I. A PLAINTIFF WHO HAS BEEN PRESENTED WITH AN OFFER OF FULL RELIEF NO LONGER HAS A PERSONAL STAKE IN THE LITIGATION AND THUS CANNOT PURPORT TO REPRESENT THE INTERESTS OF UNKNOWN PLAINTIFFS IN A COLLECTIVE ACTION

A. There Is No Live Case Or Controversy In A FLSA Collective Action After A Named Plaintiff Relinquishes Her Personal Stake In The Litigation And No Other Plaintiffs Have Opted In

In the Third Circuit's view, even after a named plaintiff's personal stake in a collective action is rendered moot, courts nonetheless must allow the litigation to continue, despite the fact that the plaintiff never moved for conditional certification and there are no other known plaintiffs associated with the action. If permitted to stand, the Third Circuit's decision would eviscerate Article III's requirement that courts adjudicate only live cases and controversies, and therefore should be reversed.

Article III of the United States Constitution limits the subject matter jurisdiction of federal courts to actual cases and controversies "capable of resolution through the judicial process." U.S. Const. art. III,

§ 2; *Flast v. Cohen*, 392 U.S. 83, 95 (1968). "Article III denies federal courts the power to decide questions that cannot affect the rights of litigants in the case before them, and confines them to resolving real and substantial controversies admitting of specific relief through a decree of a conclusive character …." *Lewis v. Continental Bank Corp.*, 494 U.S. 472, 477-478 (1990) (citations and internal quotations omitted).

As this Court observed in *Continental Bank*, "This case-or-controversy requirement subsists through all stages of federal judicial proceedings, trial and appellate …. It is not enough that a dispute was very much alive when suit was filed, or when review was obtained in the Court of Appeals. *Id.* Rather, the parties to the dispute "must continue to have a personal stake in the outcome of the lawsuit." *Id*. It logically follows, then, that a collective action brought under the FLSA should be dismissed as moot once a plaintiff no longer has any legally cognizable interest in the outcome of the case and no other plaintiffs remain with claims capable of resolution.

Relying in part on the Court's decisions in *Deposit Guaranty National Bank v. Roper*, 445 U.S. 326 (1980) and *United States Parole Commission v. Geraghty*, 445 U.S. 388 (1980), the Third Circuit below nonetheless concluded that a FLSA collective action may proceed even in the absence of a live controversy, on the theory that other, unknown plaintiffs may exist and should have an opportunity to come forward and participate in the action. While this Court in limited circumstances has sanctioned continued litigation even after an individual's personal stake in the action has ended, those cases were decided under Rule 23 of the Federal Rules of Civil

Procedure, not the FLSA. *See, e.g., Geraghty*, 445 U.S. at 403-04 (decision to deny Rule 23 class certification to class of federal prisoners was a procedural judgment reviewable on appeal, where *after* class certification had been denied the named plaintiff's personal claim in the litigation was rendered moot by virtue of the fact that he was no longer incarcerated); *Roper*, 445 U.S. at 335-40 (judgment in favor of named plaintiffs entered *after* the denial of class certification under Rule 23 did not render moot named plaintiffs' ongoing stake in the litigation, as denial of class certification was a procedural judgment that they had a right to appeal as individuals, apart from their status as class representatives).

In *Geraghty*, for example, where the named plaintiff sought and was denied Rule 23 class certification, this Court held that "an action brought on behalf of a class does not become moot upon expiration of the named plaintiff's substantive claim, even though class certification has been denied." 445 U.S. at 404 (footnote omitted). Among other things, the Court was persuaded by the fact that the individuals whom the named plaintiff sought to represent had actively moved to be substituted or intervene as named parties after the plaintiff's personal stake in the litigation had ended, which served as evidence of an ongoing, live controversy. *Id.* at 396. The Court made clear, however, that its holding was "limited to the appeal of the denial of the class certification motion." *Id.* at 404.

Likewise, in *Roper*, the Court held that the denial of class certification under Rule 23 is an appealable, procedural judgment, which is not rendered moot by a post-denial judgment. 445 U.S. at 339. It explicitly declined to address "what, if any, are the named

plaintiffs' responsibilities to the putative class *prior* to certification ...." *Id.* at 340 n.12 (emphasis added). These cases stand for the basic principle that the denial of Rule 23 class certification is an appealable *procedural* judgment. They are not applicable outside of the class action context. *Geraghty*, 445 U.S. at 404.

B. Unlike In Rule 23 Class Actions, Plaintiffs Represent Only Themselves In FLSA Collective Actions

The Third Circuit's misguided reliance on *Roper* and *Geraghty* ignores the fundamental basis upon which the Court arrived at those decisions, to wit, that in Rule 23 class actions, named plaintiffs have two separable and distinct interests: (1) their personal stake in the litigation; and (2) their responsibility "to represent the collective interests of the putative class." *See Roper*, 445 U.S. at 331; *Geraghty*, 445 U.S. at 402 ("A plaintiff who brings a class action presents two separate issues for judicial resolution. One is the claim on the merits; the other is the claim that he is entitled to represent a class"). Critical differences between Rule 23 class actions and FLSA collective actions, however, preclude the possibility that a named plaintiff in a collective action could purport to represent a "class" of unknown plaintiffs that have yet to come forward.

Unlike employment class actions filed under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq.*, or the Americans with Disabilities Act, 42 U.S.C. §§ 12101 *et seq.*, class-based claims brought under the FLSA are not subject to the procedural requirements of Rule 23. Among other things, Rule 23 requires that plaintiffs seeking class certification show that the case is suitable for class treatment in

that (1) it is large enough ("numerosity"); (2) there are questions of law or fact common to the class ("commonality"); and (3) that the named plaintiffs are typical of those of the class as a whole ("typicality"). Fed. R. Civ. P. 23. In contrast, a plaintiff asserting class-based claims under the FLSA is permitted to bring a collective action on behalf of all similarly situated employees, *i.e.*, those who, like the plaintiff, were entitled to receive, but allegedly were denied, the minimum wage or overtime pay. 29 U.S.C. § 216(b). Further, unlike a Rule 23 class action, in which the plaintiff presumptively represents a class of individuals from the commencement of the litigation, in a collective action the named plaintiff represents no one; other plaintiffs must affirmatively "opt-in" to the litigation. *Id.*

As originally drafted, the FLSA did permit representative actions, allowing an individual to "designate an agent or representative to maintain such action for and in behalf of all employees similarly situated." *Martino v. Mich. Window Cleaning Co.*, 327 U.S. 173, 175 n.1 (1946) (quoting Fair Labor Standards Act of 1938, Pub. L. No. 75-718, § 16(b), 52 Stat. 1060, 1069 (1938)). Citing concerns that the FLSA had resulted in "wholly unexpected liabilities," 52 Stat. 1060 (1938), with the potential to "bring about financial ruin of many employers," *id.*, Congress soon revised the statute to eliminate "representative actions" and require that parties affirmatively "opt-in" to a collective action. Portal-to-Portal Act of 1947, ch. 52, §§ 1(a), 5(a), 61 Stat. 84, 87 (codified as amended at 29 U.S.C. § 251(a), 29 U.S.C. § 216(b)). As this Court observed in *Hoffmann-La Roche, Inc. v. Sperling*, "[t]he relevant amendment was for the purpose of limiting private FLSA plaintiffs to employees who asserted claims in their own

right and freeing employers of the burden of representative actions." 493 U.S. 165, 173 (1989). *See also, e.g., Smith v. T-Mobile USA, Inc.*, 570 F.3d 1119, 1123 (9th Cir. 2009) (holding that a collective action plaintiff "has no independent right to represent a class that would preserve a personal stake in the outcome for jurisdictional purposes," but rather "his right to represent a class depends entirely on whether other plaintiffs have opted in"); *Cameron-Grant v. Maxim Healthcare Servs., Inc.*, 347 F.3d 1240, 1249 (11th Cir. 2003) (holding that even if similarly situated individuals exist, a named plaintiff in a collective action has "no right to represent them" until "other plaintiffs affirmatively opt into the class by giving written and filed consent").

While the Third Circuit below acknowledged that the differences between Rule 23 and the FLSA altered the "conceptual mootness inquiry," Pet. App. 24 (quoting *Sandoz*, 553 F.3d at 920), it nonetheless declined to afford those differences any controlling weight, concluding instead that the FLSA does not prevent the named plaintiff "from fulfilling a representative role." Pet. App. 22 n.11. The difference between individual and representative actions is not merely "conceptual," however. While it may be true, as the Third Circuit suggests, that class actions and collective actions share the common goal of resolving numerous claims at one time, thereby reducing the potential burden and potential costs associated with litigating such claims individually, the fact remains that Congress intentionally chose two different means of achieving those goals. To the extent that the decision below ignores that reality, it is erroneous and should be reversed.

II. PERMITTING LITIGATION TO PROCEED IN THE ABSENCE OF ANY REMAINING SUBSTANTIVE OR PROCEDURAL ISSUES WOULD FRUSTRATE THE WELL-ESTABLISHED PUBLIC POLICY FAVORING SETTLEMENT OVER PROTRACTED LITIGATION

Affirming the Third Circuit's decision will only encourage costly and acrimonious litigation, a result that is fundamentally inconsistent with this Court's jurisprudence and sound public policy favoring the voluntary resolution of claims. In *Hoffman-La Roche*, the Court decided the narrow question of whether and to what extent district courts may play a role in the ADEA collective action notification process.[2] 493 U.S. at 169. There, unlike the present case, plaintiff had introduced into evidence letters from over 400 individuals seeking to be included in the litigation and sought the court's assistance in ensuring proper notification of the collective action. *Id.* at 168. While the Court held that courts are permitted *some* discretion in prescribing the terms and conditions of communication from a named plaintiff to the potential collective action members, it emphasized that this discretion was limited and must not rise to the level of *soliciting* claims, concluding that "courts must take care to avoid even the appearance of judicial endorsement of the merits of the action." *Id.* at 174. The Court must exercise that discretion here

[2] The ADEA specifically adopts the FLSA's collective action mechanism. 29 U.S.C. § 626(b). While there is no statutorily-mandated notification procedure, it is common for plaintiffs to seek the court's assistance in sending formal notifications to potential collective action members, thereby allowing them to "opt-in" to the litigation.

and not craft a decision that would permit trial courts to solicit countless additional FLSA, EPA, and ADEA plaintiffs.

By permitting litigation to continue in the absence of a named plaintiff or even a motion for conditional certification, plaintiff's attorneys effectively would be transformed into de facto "representatives," thus enabling precisely the type of litigation Congress attempted to eliminate from the FLSA in 1947.

Both this Court and Congress repeatedly have reaffirmed the strong public policy favoring the settlement of statutory employment claims. Section 118 of the Civil Rights Act of 1991, for example, urges employers and employees alike to use out-of-court methods, including settlement negotiations, to resolve disputes arising under federal employment and labor laws:

> Where appropriate and to the extent authorized by law, the use of alternative means of dispute resolution, including *settlement negotiations*, conciliation, facilitation, mediation, factfinding, minitrials, and arbitration, is encouraged to resolve disputes arising under the Acts or provisions of Federal law amended by this title.

Pub. L. No. 102-166, § 118, codified as 42 U.S.C. § 1981 note (Alternative Means of Dispute Resolution) (emphasis added). *See also, e.g., Occidental Life Ins. Co. v. EEOC*, 432 U.S. 355, 368 (1977) (favoring conciliation "whenever possible"); *W.R. Grace & Co. v. Local Union 759*, 461 U.S. 757, 770-71 (1983) (voluntary compliance is an "important public policy" intended by Congress to be the "preferred means of enforcing Title VII") (citation omitted). Employers readily embrace this notion, preferring the certainty

of out-of-court settlement over the uncertainly of protracted litigation. This is particularly true of claims arising under statutes such as the FLSA, which does not require a showing of intent in order to establish liability.

If permitted to stand, the Third Circuit's decision would make it nearly impossible for employers to bring closure to FLSA collective actions through voluntary settlement of the named plaintiff's claims. It would be manifestly unjust to allow—let alone mandate—the "meter" to run on such claims after the only known plaintiffs' interests have expired and no motion for conditional certification has been filed. Furthermore, the Court's decision likely will have significant implications well beyond the FLSA context. *See*, *e.g.*, the Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 626(b) (incorporating the FLSA's collective action provisions).

In addition, the Third Circuit's decision has the undesirable effect of loosening the FLSA's already generous collective action conditional certification standards, under which a party must show only that individuals are "similarly situated." 29 U.S.C. § 216(b). That standard stands in stark contrast to the stringent Rule 23 class certification standards that apply to most other class-based litigation in the federal courts, *see Wal-Mart Stores, Inc. v. Dukes*, __ U.S. __, 131 S. Ct. 2541 (2011), and the Court must take care not to make the filing of collective actions even more attractive by allowing plaintiff-less plaintiff's attorneys to reap a windfall of fees at employers' expense.

The far more simple and practical solution is to reverse the decision below, which would ensure that employers can make legitimate settlement offers

aimed at fully compensating the named plaintiff and finally resolving the contested claim, while preserving the rights of unknown plaintiffs.

CONCLUSION

Accordingly, the *amicus curiae* Equal Employment Advisory Council respectfully requests that the decision below be reversed.

Respectfully submitted,

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